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Supreme Court, U.S.
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MICHAEL RODAK, JR.

No. A-63

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

THE COUNTY OF WASHINGTON AND SHERIFF WARREN BARNES, IN HIS CAPACITY AS SHERIFF OF WASHINGTON COUNTY,

Petitioners,

v.

ALBERTA GUNTHER, VELENE M. VALLANCE, MARION E. VANDER ZANDEN AND YVONNE M. HATTON,

Respondents.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT
OF APPEALS FOR THE NINTH CIRCUIT

BRIEF IN OPPOSITION

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QUESTION PRESENTED FOR REVIEW

Are claims of intentional gender-based wage discrimination, which do not meet the equal work standard of the Equal Pay Act, 29 U.S.C. § 206(d), actionable under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §§ 2000e-1 to 2000e-17?

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ALBERTA GUNTHER, VELENE M. VALLANCE, MARION E. VANDER ZANDEN AND YVONNE M. HATTON,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

STATEMENT OF THE CASE

Respondents Alberta Gunther, Velene Vallence, Marion Vander Zanden

and Yvonne Hatton were jail matrons employed by Washington County, Oregon. As matrons, their principal responsibilities were to process and guard female prisoners. On occasion, respondents transported prisoners, assisted in arrests, and processed records. They also performed duties relating to male inmates, including booking them in, taking mug shots, and fingerprinting.

Respondents' male counterparts in the jail performed essentially the same functions as matrons, but only with respect to male prisoners. Until June 1973, respondents' male counterparts were deputy sheriffs and deputy sheriff recruits who were assigned to the jail on a temporary rotating basis. Deputies were paid between $668 and $853 per month, and recruits received monthly salaries

ranging from $636 to $736, while the respondents were paid from $476 to $606 per month for their work. (Dist. Ct. Opinion at 4.)

Beginning in June 1973, deputies and recruits were phased out of jail duties and replaced by "corrections officers," a newly created position ostensibly open to both men and women. At that time corrections officers' monthly salaries ranged from $701 to $896, corrections officer trainees salaries ranged from $668 to $812 and matrons were paid from $525 to $668 per month.

In the spring and summer of 1973, the respondent matrons unsuccessfully pressed requests for equal pay with the Washington County Police Officers Association, the bargaining unit for County jail employees. A few months later,

Washington County closed the women's jail, boarded out its female prisoners in an adjoining county's facilities, and terminated the respondent matrons' jobs. Two other matrons who had not sought equal pay were transferred to other positions within the jails. At the time of respondents' discharge, the defendant sheriff completed personnel forms on which he stated that respondents should not be rehired in other capacities. The respondents' subsequent efforts to secure reemployment with the County were unsuccessful.

The respondents then filed this action under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §§ 2000e-1-- 2000e-17 (1976) and the Equal Pay Act, 29 U.S.C. § 206(d)(1) (1976). They alleged generally that the defendant County and officers had denied them equal

pay for substantially equal work, that even if their work was not the substantial equivalent of that performed by the deputy sheriffs and corrections officers, some element of the disparity in compensation was solely attributable to discrimination on the basis of sex, and that the defendants had terminated and refused to rehire them in retaliation for their equal pay requests.

The district court entered judgment for the defendants. The court found that the matrons' work was not substantially equal to that performed by deputies and corrections officers and concluded that this resolution of the equal pay issue precluded further consideration of the alternative discriminatory compensation claim. The trial court also rejected respondents' retaliatory discharge claims.

The Court of Appeals for the Ninth Circuit affirmed the district court's disposition of the equal work and retaliatory discharge questions as not clearly erroneous. The court held, however, that the Equal Pay Act's equal work standard did not govern respondents' Title VII claim that differences in the compensation of male and female corrections personnel were, at least in part, attributable to sex discrimination. Gunther v. Washington County, 623 F.2d 1303 (9th Cir. 1979). The panel found that under the Bennett Amendment, 42 U.S.C. § 2000e-2(h), the Equal Pay Act's four affirmative defenses were incorporated into Title VII, but its equal pay formulation was not adopted as the controlling substantive standard for all wage discrimination claims under the Civil Rights Act. 623 F.2d at 1311-13,

1317-21. Accordingly, while equal pay claims under Title VII or the Equal Pay Act are tested against identical criteria, Title VII's broad remedial mandate affords relief for discriminatory compensation, even when claimants cannot establish substantial equality of employment. The court instructed the district court on remand to consider evidence of intentional sex discrimination in fixing the matrons' compensation.

The defendant County subsequently petitioned for rehearing. The appellate panel, in denying that petition, filed a supplemental opinion which comprehensively analyzed the interrelationship of the Equal Pay Act and Title VII. The court emphasized that it was not substituting a "comparable" work test for the "equal"

work standard, and that a Title VII plaintiff could not establish a prima facia case solely by alleging that her job requirements were comparable to those of similarly situated males. 623 F.2d at 1321. The court of appeals simply recognized a right of recovery under Title VII for claimants who demonstrate that they have been undercompensated because of intentional gender-based discrimination.

REASONS FOR DENYING THE WRIT

The Ninth Circuit's holding does not conflict with decisions of other courts of appeal. Only one other appellate court, the Third Circuit, has squarely considered whether claims of intentional discrimination in compensation, which do not allege substantial equality of work, are cognizable under Title VII. That

court, citing the Gunther opinion favorably, resolved the issue consistly with the Ninth Circuit's holding. IUE v. Westinghouse Electric Corp., 23 F.E.P. Cases 588 (3d Cir. 1980). Allegedly conflicting decisions cited by the petitioners are, in fact, distinguishable from, and reconcilable with, Gunther. In Lemons v. City and County of Denver, 620 F.2d 228 (10th Cir. 1980), the court rejected a comparable work theory, a concept neither raised nor endorsed in Gunther. Petitioners also rely upon a number of cases in which plaintiffs raised conventional equal pay claims.[1] In those instances, the courts

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[1] DiSalvo v. Chamber of Commerce, 568 F.2d 593 (8th Cir. 1973); Laffey v. Northwest Airlines, Inc., 567 F.2d 429 (D.C. Cir. 1976), cert. denied, 434 U.S. 1086 (1978); Calage University of Tennessee, 544 F.2d 297 (6th Cir. 1977); Orr v. MacNeill and Son, 511 F.2d 166 (5th Cir. 1975), cert. denied, 423 U.S. 865 (1975); Ammons v. Zia Co., 448 F.2d 117 (10th Cir. 1971).

had no occasion to consider whether claims of intentional pay discrimination between unequal jobs are cognizable under Title VII.

Nor does the Ninth Circuit's holding conflict with applicable decisions of this Court. In General Electric Co. v. Gilbert, 429 U.S. 125 (1976), this Court held that interpretations of the Equal Pay Act are applicable to Title VII claims when the coverage of the statutes intersects. But the Court did not limit Title VII's remedies for discriminatory compensation claims to those defined by the Equal Pay Act. Accordingly, while the Gunther panel followed Gilbert's teaching, it could, consistently, recognize a cause of action for intentional discrimination under Title VII.

This Court's decisions endorsing the in pari materia principle of

statutory construction do not apply here. Title VII, as construed by the Ninth Circuit, did not alter the scope of the Equal Pay Act; rather, it created remedies for discriminatory compensation in situations which are different from those addressed by the Equal Pay Act. That construction is consistent with the Court's direction that employment discrimination provisions, because of their broad remedial character, are to be regarded as complementary and supplementary. Alexander v. Gardner-Denver Co., 415 U.S. 36, 48-49 & n.9 (1974).

The Court of Appeal's holding was correct. Only the Third and Ninth Circuits have considered whether Title VII affords a remedy for intentional wage discrimination when equality of work cannot be established. Both courts, after comprehensive, thoughtful consideration of

legislative and regulatory materials, concluded that Title VII provides such relief. No court has addressed, much less refuted, the reasoning of these opinions.

Finally, petitioners exaggerate, or perhaps misapprehend, the significance of the Ninth Circuit's holding. The court did not, as petitioners imply, endorse a concept of comparable work in Title VII wage discrimination actions. Indeed, the court explicitly stated that allegations of comparable work would not state a prima facia case under Title VII, and the issue of comparable work was never asserted by the plaintiffs either at trial or on appeal. The ruling below was quite limited: plaintiffs who establish that they have received lower wages because of intentional gender-based discrimination

are entitled to recover under Title VII. It is on this basis that respondents respectfully request the Court to consider the merits of the petition.

I. THE NINTH CIRCUIT'S HOLDING DOES NOT CONFLICT WITH DECISIONS OF OTHER COURTS OF APPEAL.

Petitioners contend that the Ninth Circuit's decision in this case is contrary to the law of five other circuits. (Pet. 11-16) Close examination of the cases, however, shows this inter-circuit "conflict" to be illusive, not real. Only the Third Circuit has addressed the questions considered in Gunther, and that court's resolution of those issues paralleled the Ninth Circuit's.

Five of the ostensibly conflicting cases which petitioners cite involved conventional equal pay claims brought under Title VII. DiSalvo v. Chamber of

Commerce, 568 F.2d 593 (8th Cir. 1973); Laffey v. Northwest Airlines, Inc., 567 F.2d 429 (D.C. Cir. 1976), cert. denied, 434 U.S. 1086 (1978); Calage University of Tennessee, 544 F.2d 297 (6th Cir. 1977); Orr v. MacNeill and Son, 511 F.2d 166 (5th Cir. 1975), cert. denied, 423 U.S. 865 (1975); Ammons v. Zia Co., 448 F.2d 117 (10th Cir. 1971). The courts in these cases implied in dicta that Title VII plaintiffs must meet the Equal Pay Act's requirements if they are to prevail in wage discrimination actions. These courts, however, had no need to consider--and did not consider--whether a wage discrimination claim based on a theory other than equal pay must satisfy the standards of the Equal Pay Act. Significantly, the DiSalvo, Callage, Orr, and Amons

panels did not even address the relationship between Title VII and the Equal Pay Act under the Bennett Amendment, the crucial element of the Ninth Circuit's analysis.[2] Such ambiguous and poorly-considered dicta do not reflect a substantial or direct conflict among the courts of appeal.

Fundamental inter-circuit conflict, if any, must then be gleaned from the four decisions in which courts of appeal have considered whether wage discrimination claims that do not satisfy the Equal Pay Act's equal work criterion are cognizable under Title VII: Gunther; IUE v. Westinghouse Electric Corp., 23

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[2] The court in Laffey v. Northwest Airlines, supra, construed the Bennett Amendment as mandating the application of the same standards "in the relatively small area in which [the Equal Pay Act and Title VII] are congruent." 567 F.2d at 446. The Ninth Circuit endorsed this approach in Gunther.

FEP Cases 588 (3d Cir. 1980); Lemons v. City and County of Denver, 620 F.2d 228 (10th Cir. 1980), petition for cert. filed, 49 U.S.L.W. 3031 (U.S. July 18, 1980) (No. 80-82); and Stastny v. Southern Bell Telephone & Telegraph Co., ____ F.2d ____ (4th Cir. July 28, 1980). IUE v. Westinghouse Electric Corp., as petitioners concede, is consistent with Gunther. So the quest for conflict must focus on Lemons and Stastny.

The plaintiff nurses in Lemons did not allege the city had intentionally discriminated between its male and female employees. Instead, they sought relief under a comparable work theory, asserting that the city's classification and pay plan perpetuated historical gender-related inequities in compensation by fixing the

compensation of public employees by reference to the pay for like work in the community. The plaintiffs argued that their positions should be classified and their wages fixed, not by comparison with other nurses in the community, but by reference to non-nursing administrative positions within the city. The Tenth Circuit rejected this comparable work approach.

Respondents in this case did not assert a comparable work concept. Nor did the Ninth Circuit's holding endorse such an approach. Instead, the court ruled that intentional wage discrimination is actionable under Title VII, a question not before the Lemons panel. There is no conflict.

The significance of Stastny v. Southern Bell is less certain. That case has many of the hallmarks of the equal

pay-based decisions discussed above;[3] indeed, Judge McMillan's opinion for the district court includes a heading titled "Back pay on account of failure to pay women equally for equal work." 458 F.Supp. 314, 352 (W.D.N.C. 1978). However, the district court opinion also described willfull and pervasive discrimination by the defendant. It is unclear whether plaintiffs asserted intentional discrimination as a basis for recovery, independent of their equal pay claims. Consequently, it is unclear from the Fourth Circuit's summary treatment of

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[3] DiSalvo v. Chamber of Commerce, 568 F.2d 593 (8th Cir. 1973); Laffey v. Northwest Airlines, Inc., 567 F.2d 429 (D.C. Cir. 1976), cert. denied, 434 U.S. 1086 (1978); Calage University of Tennessee, 544 F.2d 297 (6th Cir. 1977); Orr v. MacNeill and Son, 511 F.2d 166 (5th Cir. 1975), cert. denied, 423 U.S. 865 (1975); Ammons v. Zia Co., 448 F.2d 117 (10th Cir. 1971).

the individual plaintiffs' wage claims whether the court rejected intentional discrimination as a separate basis for recovery or simply held that the plaintiffs had not established the requisite equality of work for an equal pay claim under Title VII. Any conflict with Gunther is, at most, implicit.

It is striking that although Lemons was decided after the original opinion in Gunther, and Stastny after the issuance of the supplemental opinion, panels in neither case referred to the Ninth Circuit's holding. This is significant in two respects. First, it may indicate that the Fourth and Tenth Circuits viewed their cases as so distinguishable from Gunther that they perceived no conflict. Conversely, it may show that neither of those courts was aware of the

Ninth Circuit's reasoning and therefore did not have the benefit of it. If so, even if there is true conflict among the courts of appeal, the Fourth and Tenth Circuits should be given an opportunity to reconsider their positions in light of the comprehensive analysis presented in Gunther and IUE v. Westinghouse Electric Corp. Such reconsideration might well preclude the need for review by this Court.

II. THE NINTH CIRCUIT'S HOLDING IS CONSISTENT WITH THE DECISIONS OF THIS COURT.

Petitioners contend that the holding below conflicts with General Electric Co. v. Gilbert, 429 U.S. 125 (1976), and with other decisions of the Court in applying the in pari materia canon of statutory construction. This contention, like petitioners' allegations of conflict

among the courts of appeals, reflects a fundamental misunderstanding of the nature of the Ninth Circuit's ruling. In General Electric Co. v. Gilbert, the Court found that denial of disability benefits to female employees who were absent from work as a result of pregnancy did not violate Title VII because that denial was "based on a factor other than sex," an affirmative defense under section 6(d)(1) of the Equal Pay Act, 29 U.S.C. § 206(d)(1), incorporated into Title VII through the Bennett Amendment. The Court did not, however, hold that, in addition to incorporating the Equal Pay Act's affirmative defenses under Title VII, the Bennett Amendment also limits Title VII wage discrimination actions to those satisfying the Equal Pay Act's equal work requirements. Gilbert does

not compel such a broad construction of the Bennett Amendment.

The Gunther panel, consistent with Gilbert, read the Bennett Amendment as incorporating affirmative defenses under the Equal Pay Act into Title VII. 623 F.2d at 1312. Accord, Manhart v. City of Los Angeles Dept. of Power and Water, 553 F.2d 581 590 (9th Cir. 1977). The court further emphasized, again consistent with Gilbert, that the Equal Pay Act and Title VII should be construed harmoniously when their coverage overlaps; equal pay claims under either provision are to be tested against the same standards. 623 F.2d at 1313, 1321. The Ninth Circuit's construction of Title VII and the Bennett Amendment was not, then, contrary to Gilbert. The Court of Appeals, in recognizing a separate cause of action

for intentional wage discrimination under Title VII, decided an issue that this Court had neither considered nor resolved.

Petitioners' analysis regarding in pari materia construction is similarly flawed. That principal of statutory interpretation is triggered only when broad application of a general statute would alter or nullify the effect of a more specific provision. Radzanower v. Touche, Ross & Co., 426 U.S. 148, 153 (1976). Here, the Ninth Circuit's interpretation of Title VII did not affect the application of the Equal Pay Act. Contrary to petitioners' assertion (Pet. 21-23), the court did not effectively repeal the Equal Pay Act's equal work standard by recognizing a comparable work standard for equal pay actions under Title VII. The court explicitly disavowed that result. The

Ninth Circuit preserved the equal work requirement, while construing Title VII as providing supplemental relief for certain non-equal pay related claims. This expansive reading of Title VII is consistent with this Court's direction that remedies for discrimination should be construed as complementary. Alexander v. Gardner-Denver Co., 415 U.S. 36, 47 (1974). Principles of in pari materia do not apply.

III. THE COURT OF APPEALS CORRECTLY CONSTRUED TITLE VII.

The most compelling validation of the Ninth Circuit's reading of Title VII is the result petitioners' alternative, contrary, construction would sanction. If, as petitioners suggest, Title VII's coverage of pay claims is limited to situations where the plaintiff can show equal work by men, employers

would be free to establish pay rates for jobs based solely on the gender of the incumbents, without regard to the nature of the work. As the Third Circuit observed, Title VII bars this type of intentional wage discrimination on the basis of race, color, religion, or national origin.[4] IUE v. Westinghouse Electric

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[4] Section 703(a), 42 U.S.C. §2000e-2(a) provides:

> (a) It shall be an unlawful employment practice for an employer--
>
> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or
>
> (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend

Corp., 23 FEP Cases at 592. The essential inquiry in interpreting Title VII, particularly the Bennett Amendment, is whether Congress intended to insulate such intentional discrimination against women.

The Bennett Amendment, 42 USC § 2000e-2(h), provides:

> It shall not be an unlawful employment practice under this subchapter for any employer to differentiate upon the basis of sex in determining the amount of compensation paid or to be paid to employees of such employer if such differentiation is authorized by the provisions of [the Equal Pay Act].

Discrimination in compensating employees of the opposite sex who perform equal

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4 (cont'd)
to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

work is "authorized" by the Equal Pay Act only if it is attributable to seniority, merit, output, or some factor other than sex. 29 U.S.C. § 206(d)(1).[5] Nothing

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[5] 29 U.S.C. § 206(d) provides in pertinent part:

> (d)(1) No employer having employees subject to any provisions of this section shall discriminate, within any establishment in which such employees are employed, between employees on the basis of sex by paying wages to employees in such establishment at a rate less than the rate at which he pays wages to employees of the opposite sex in such establishment for equal work on jobs the performance of which requires equal skill. effort, and responsibility, and which are performed under similar working conditions, except where such payment is made pursuant to (i) a seniority system; (ii) a merit system; (iii) a system which measures earnings by quantity or quality of production; or (iv) a differential based on any other factor other than sex: Provided, That an employer who is paying a wage rate differential in violation of this subsection shall not, in order to comply with the provisions of this subsection, reduce the wage rate of any employee.

in the Equal Pay Act authorizes--in its clearest sense, positively sanctions--discrimination which does not fall within its terms. The authorization language of the Bennett Amendment reflects a legislative intent to incorporate the Equal Pay Act's four affirmative defenses, not to adopt equal work-equal pay as the sole measure of wage discrimination under Title VII.

Legislative commentary concerning the Bennett Amendment is, at best, murky. As the Third Circuit noted in IUE v. Westinghouse Electric Corp., "an ingenious and intelligent mind may find support in all of [the legislative materials]" for either of the contending constructions. 23 F.E.P. Cases at 594. And petitioners have demonstrated great ingenuity.

The most plausible reading of the limited legislative history is that in areas of overlap between Title VII and the Equal Pay Act--equal pay actions under Title VII--Congress intended the Equal Pay Act's affirmative defenses, with corresponding judicial and administrative interpretations, to apply. This construction, adopted by the Third and Ninth Circuits, finds support in Senator Dirksen's observation that "[a]ll that the pending amendment does is recognize these exceptions [under the Equal Pay Act], that are carried in the basic Act," and in Senator Bennett's statement that the amendment was designed "to provide in the event of conflicts, the provisions of the Equal Pay Act shall not be nullified." 110 Cong. Rec. 13647 (1964). Nothing in the contemporaneous legislative

history expresses a clear congressional desire to treat intentional gender-related wage discrimination differently than intentional discrimination on other bases. If, as petitioner contends, Congress had intended to so substantially qualify the remedial mandate of the Civil Rights Act, it would have done so explicitly.

The Ninth Circuit's interpretation of the Bennett Amendment is also consistent with applicable administrative regulations. 29 C.F.R. § 1604.8, issued by the Equal Employment Opportunity Commission in 1972, provides in relevant part as follows:

> Relationship of Title VII to the Equal Pay Act.
>
> (a) The employee coverage of the prohibitions against discrimination based on sex contained in Title VII is coextensive with that of the other prohibitions contained in Title VII and is not limited by Section 703(h) to those employees covered by the Fair Labor Standards Act.

While the force of this interpretation is somewhat diminished because it was not contemporaneous, it is entitled to great deference under the criteria defined in General Electric Co. v. Gilbert, 429 U.S. at 140-44 (1976). See Griggs v. Duke Power Co., 401 U.S. 424, 433-34 (1971). Contrary to petitioners' contention, this regulation, unlike the EEOC regulation considered in Gilbert, does not "flatly contradict" an earlier EEOC pronouncement.

In 1965 the Commission published a regulation, formally codified at 29 C.F.R. § 1604.7, which read in relevant part as follows:

> (a) Title VII requires that its provisions be harmonized with the Equal Pay Act (section 6(d) of the Fair Labor Standards Act of 1938. 29 U.S.C. 206(d) in order to avoid conflicting interpretations or requirements with respect to situations to which both statutes are

> applicable. Accordingly, the Commission interprets section 703(h) to mean that the standards of "equal pay for equal work" set forth in the Equal Pay Act for determining what is unlawful discrimination in compensation are applicable to Title VII. However, it is the judgment of the Commission that the employee coverage of the prohibition against discrimination in compensation because of sex is co-extensive with that of the other prohibitions in section 703, and is not limited by section 703(h) to those employees covered by the Fair Labor Standards Act.

30 Fed. Reg. 14928 (1965). The language of the last sentence of this regulation is nearly identical to that of 29 C.F.R. § 1604.8(a) set out above. Title VII and the Equal Pay Act are to be construed harmoniously, but the terms of the latter do not define the scope of the former. The Commission's interpretations of Title VII are consistent and authoritative.

The Ninth Circuit's reading of the Bennett Amendment is in accordance

with that provision's plain language, its legislative history, and its administrative application. It effectuates, rather than qualifies, Title VII. The court correctly rejected petitioners' position.

CONCLUSION

The petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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